ORAL ARGUMENT SET FOR DECEMBER 5, 2018

CASE NO. 18-1109

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLLECTIVE CONCRETE, INC. and REMCO CONCRETE LLC,
Petitioners/Cross-Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

NEW JERSEY BUILDING LABORERS DISTRICT COUNCIL,
Intervenor

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL REPLY BRIEF OF PETITIONERS

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GLOSSARY

Act or NLRA:	National Labor Relations Act
ALJ:	Administrative Law Judge
ALJD:	Administrative Law Judge's Decision
Board:	National Labor Relations Board
Board Br.:	Board's Brief
CBA:	Collective Bargaining Agreement
JA:	Joint Deferred Appendix
D&O:	The Board's Decision and Order
NLRB or Board:	National Labor Relations Board
Petitioners:	Remco Concrete, LLC and Collective Concrete, Inc.
RDM:	RDM Concrete & Masonry, LLC
Remco:	Remco Concrete, LLC
Union:	New Jersey Building Laborers District Council

I. SUMMARY OF ARGUMENT

Both the Board's opposing brief and the Union's brief continue, as did the ALJ and the Board, to improperly conflate the relationship between Collective and RDM with the relationship between Remco and Collective and Remco and RDM. Moreover, both the Board and the Union improperly attempt to combine certain features of Remco and Collective's relationship with those from Remco and RDM's relationship to argue that, when both relationships are viewed together, sufficient alter ego criteria are present. There is no legal support for such a convoluted approach to the alter ego test, nor does the Board or the Union offer any. This approach was simply invented by the Board and the Union to escape the reality that there is not sufficient evidence to support that Remco is an alter ego of either Collective or RDM. In any event, even when combining the facts of Remco and Collective's relationship with Remco and RDM's, there are still not sufficient indicia that Remco is an alter ego of either.

Moreover, neither the Board nor the Union offer any compelling reason why this Court should not adopt the equitable approach to application of the alter ego doctrine adopted by the district court in *Flynn v. Interior Finishes, Inc.*, 425 F. Supp. 2d 38 (D.D.C. 2006). Instead, both simply draw trivial distinctions between *Interior Finishes* and the instant case, which have no bearing on whether this Court should adopt the equitable approach to the alter ego doctrine, and apply that

approach to Remco. While *Interior Finishes* may not be identical to this case, the overarching justification for adopting an equitable approach to the alter ego doctrine and applying it in this case remains: the alter ego doctrine is equitable in nature, and it should not be applied where harm and deception to the union are absent.

For all of these reasons, as further explained below, the Board's decision must be denied enforcement.

II. ARGUMENT

A. Contrary to the Opposing Briefs, There Is Not Substantial Evidence to Support the Board's Finding That Remco Is an Alter Ego of Collective and RDM

1. Collective and Remco Preserved Their Right to Contest the Board's Application of the Alter Ego Factors

As a threshold matter, Collective and Remco adequately apprised the Board of their objection that the ALJ improperly found Remco to be an alter ego of Collective and RDM. As such, this Court has jurisdiction to consider Collective and Remco's argument that there is not substantial evidence to support the Board's alter ego finding.

Section 10(e) of the Act bars Courts of Appeal from considering any objection not presented before the Board. *See* 29 U.S.C. § 160(e). In interpreting this provision, courts have explained that "the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the

issue *might* be pursued on appeal." *Trump Plaza Assocs. v. N.L.R.B.*, 679 F.3d 822, 829 (D.C. Cir. 2012) (internal citation and quotations omitted) (emphasis in original). Significantly, courts "have not required that the ground for the exception be stated explicitly in the written exceptions filed with the Board[.]" *Id.* (internal citation and quotations omitted). Furthermore, under the D.C. Circuit's longstanding precedent, Section 10(e) does not necessarily require briefing and argument before the Board. *See Pennsylvania State Corrections Officers Ass'n v. N.L.R.B.*, 894 F.3d 370, 376 (D.C. Cir. 2018) (quoting *Local 900, Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO v. N.L.R.B.*, 727 F.2d 1184, 1192 (D.C. Cir. 1984)). Instead, the Board may be adequately notified of a particular objection when it is stated solely in the petitioner's exceptions, but not in the petitioner's briefs. *See id.* (quoting *Davis Supermarkets Inc. v. N.L.R.B.*, 2 F.3d 1162, 1175 (D.C. Cir. 1993); *Consol. Freightways v. N.L.R.B.*, 669 F.2d 790, 793 (D.C. Cir. 1981)).

As the Board and the Union acknowledge in their briefs, the very first exception asserted in Remco and Collective's exceptions to the Board states: "Respondents except to the ALJ's determination and conclusion that Remco is an alter ego of Collective and RDM." This statement is followed by citations to the portions of pages 10 and 11 of the ALJ's Decision and Order, which contain the ALJ's factual findings and analysis as to each of the alter ego factors as they relate

to Remco's relationship with Collective and RDM. (JA635-636). Therefore, the Board cannot reasonably argue that it had no notice that Collective and Remco might pursue the sufficiency of the evidence supporting the alter ego factors on appeal. As such, Collective and Remco are not barred by Section 10(e) from contesting the merits of the Board's alter ego finding.

2. The Facts Do Not Support That Remco Is the Alter Ego of Collective or RDM

In their briefs, the Board and the Union perpetuate the ALJ and the Board's improper "guilt by association" approach in order to impose alter ego status on Remco. That is, although the only decisive issue before the ALJ and the Board was whether Remco is bound by Collective and RDM's collective bargaining obligations, the ALJ performed a painstaking analysis of the facts tending to show only that Collective and RDM are alter egos of one another. The Board argues in its brief that an analysis of Collective and RDM's relationship is necessary and relevant to Remco's alter ego status because "the Board considered Remco's relationship to those entities collectively in determining the still-contested issue of whether Remco is their alter ego." (Board Br. 13).

However, this improper approach is highly prejudicial to Remco in that it prevents a fair and unbiased analysis of Remco's relationship with Collective and with RDM, respectively. In essence, the Board's decision suggests that Remco is doomed from the start, no matter what, as a result of the alleged sins of Collective

and RDM. In fact, compared with Collective and RDM's relationship with each other, and with the relationships between the entities in the cases cited in the Board and the Union's briefs, Remco's relationships with Collective and RDM lack the main indicia of alter ego status.

Perhaps recognizing this reality, the Board combines features of Remco's relationship with Collective with features of Remco's relationship with RDM in an effort to tally up as many alter ego factors as possible. However, the Board has offered no legal basis for such an unjust approach. In any event, whether analyzed properly (i.e., separately) or together, it is clear that Remco is an entity entirely separate and independent from Collective and RDM, and that there is not sufficient evidence to the contrary.

3. There Are Insufficient Alter Ego Indicia Between Remco and Collective

Remco and Collective have the same owner. Collective and Remco do not, however, have the same management and supervision. As found by the ALJ (and affirmed by the Board), Collective was managed by Ryan Ciullo *and Mark Ciullo*. (JA633). That is, Mark was in charge of labor relations for Collective and provided operational management in the office, while Ryan managed the jobsites. (*Id.*). Moreover, Mark Ciullo's daughter, Desiree Ciullo, was the office manager for Collective. (*Id.*).

On the other hand, there is no evidence, nor did the Board or the ALJ find, that either Mark Ciullo or Desiree Ciullo ever played any role in or had any involvement with Remco whatsoever, in any capacity. Remco is and always has been run and managed in every aspect solely by Ryan Ciullo; and, neither Mark Ciullo nor Desiree Ciullo had any involvement in Remco. (JA106). There is also no record evidence that Remco ever borrowed money from Collective. Indeed, there is no record evidence of any transactions between Remco and Collective whatsoever, whether arms-length or not.

Moreover, the record facts show that Remco operates out of an entirely separate and independent office than that shared by Collective and RDM. Specifically, Collective operated out of 460 Faraday Avenue, Suite 3 in Jackson New Jersey, (JA280), while Remco initially operated out of Ryan's home at 326 Stephan Avenue in Toms River, New Jersey, and thereafter out of 1889 Route 9 in Toms River, New Jersey, where it remains today. (JA50, 174).

Nor has there been any evidence adduced that Remco and Collective use the same equipment. At most, the ALJ found that Remco used the same *type* of equipment as Collective and RDM, but not that the companies shared or borrowed equipment from one another. (JA633). But the fact that two companies use the same *type* of equipment does not suggest that the two companies are alter egos of one another. Indeed, in many of the cases relied upon by the Board and the Union,

the companies at issue were using not the same type of equipment, but were actually sharing the *same* equipment with one another. *See Island Architectural Woodwork, Inc. v. N.L.R.B.*, 892 F.3d 362, 372-73 (D.C. Cir. 2018) (using same equipment); *Kenmore Contracting Co.*, 289 NLRB 336, 338 (N.L.R.B. 1988) (same), *order enforced sub nom. Kenmore Contracting v. N.L.R.B.*, 888 F.2d 125 (2d Cir. 1989), *and decision supplemented*, 303 NLRB 1 (N.L.R.B. 1991); *Rogers Cleaning Contractors*, 277 NLRB 482, 485 (N.L.R.B. 1985), *enforcement granted sub nom. N.L.R.B. v. Rogers Cleaning Contractors, Inc.*, 813 F.2d 795 (6th Cir. 1987); *Alexander Painting, Inc. and Silver Palette, Inc. and Int'l Union of Painters & Allied Trades, District Council 21*, 344 NLRB 1346 (2005). There is also no evidence that Remco ever used any of Collective's materials, such as concrete, or supplies.

The lone fact that Ryan referred to Collective's credit history when requesting lines of credit for Remco is not sufficient to hold that the two companies are alter egos. Indeed, Collective's credit history did not provide any advantage to Ryan in obtaining credit for Remco, as he was required to sign Remco's credit applications *personally*. (JA62). This demonstrates that creditors did not view the companies as one in the same.

Relatedly, the mere fact that, in seeking work for Remco, Ryan told a contractor that he had "over 20 years of experience" is not evidence that Remco

and Collective are alter egos. (*See* Board Br. 10 (citing GCX 21)). Ryan worked in the concrete industry since he was a teenager, and formed Collective in the late 1990's. Thus, Remco, through its principal Ryan Ciullo, has extensive industry experience, a fact which is important to relay to potential customers. Informing customers of this experience does not and practically, cannot, mean that Remco is an alter ego of every entity where Ryan gained his experience.

In its brief, the Board attempts to liken Ryan Ciullo's reliance on his past industry experience to *BMD Sportswear Corp.*, 283 NLRB 142 (1987), where two companies were found to be alter egos of one another. The quoted portion of that case stands for the proposition that, when the owners of two companies have a close familial relationship, and one of the owners "lack[s] the management experience and expertise in the industry" such that the experience of the relative must be used, it is highly likely that the family member with experience "dominate[s] the management of both companies." *Id.* at 155. This is an entirely different scenario than Ryan relying on *his own* expertise in an industry in which he grew up working.

The fact that Remco and Collective share a similar business purpose (i.e., concrete and masonry work) cannot carry the day in terms of the alter ego analysis. First, unlike the cases cited by the Board and the Union (which are elaborated upon below), notably absent from the record is any evidence that Remco has any of the

same customers as Collective. Nor did the Board or the ALJ make any such finding. Moreover, as discussed in detail in Petitioners' opening brief, the law permits a firm to create two separate and distinct entities: one that is a party to a collective bargaining agreement with a union, and one that is not. *See C.E.K. Indus. Mech. Contractors, Inc. v. N.L.R.B.*, 921 F.2d 350, 352 at n.3 (1st Cir. 1990); *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275 (9th Cir. 1984). The only instance in which the separateness of a double-breasted operation is not respected is when there are indicia that the two entities are in fact alter egos of one another.

As demonstrated above, the record is bereft of any evidence that Remco's operations were "virtually unchanged from those of" Collective such that the two are alter egos of one another. (Board Br. 26). Remco is entirely separate and distinct from Collective, aside from the fact that the two companies share an owner. This conclusion is made even clearer by the cases cited in the opposing briefs where the Board or the court found two companies to be alter egos of one another. For example, in *Island Architectural Woodwork, Inc.*, the non-union entity had substantial control over the union entity, and the two operated out of the same premises and used the same equipment. 892 F.3d at 373. The union entity also received "significant operational assistance" in the form of money and other contributions. *Id.*

Similarly, in *Kenmore Contracting Co.*, the two entities operated out of the same premises and used the same office equipment and supplies. 289 NLRB at 338. Moreover, the non-union entity did not own any of its own equipment, and instead used and leased the equipment of its union counterpart.

In *Rogers Cleaning Contractors*, the two companies provided service to the same customers, using the same employees, supervisors, equipment, and offices. 277 NLRB at 485. In *Alexander Painting, Inc.*, the successor company shared with its predecessor a premises and office equipment, painting equipment and vehicles and was been using is predecessor's customer information and contacts in its business operations. *See also Midwest Heating and Cooling*, 341 NLRB No. 52 (2004), *enf'd* 408 F.3rd 450 (8th Cir. 2005) (finding entities to be alter egos where non-union company purchased all union company's inventory and equipment, serviced the same customers, and, before the union company went out of business, relied on it for supplies).

The facts of the cases relied upon by the Board and the Union stand in stark contrast to the facts characterizing the relationship between Remco and Collective. As mentioned above, there is no evidence that Remco uses any of Collective's equipment or operates out of the same office or premises as Collective. Moreover, there is no evidence, nor did the Board or the ALJ find, that Collective ever provided operational assistance to Remco, whether monetary or otherwise. There is

also no evidence, nor did the Board or the ALJ find, that Remco caters to any of Collective's customers. In short, there is simply no commingling between Remco and Collective.

At most, Remco and Collective are a lawfully double-breasted operation, with each entity performing work in its respective markets. Indeed, in *A.D. Conner, Inc.*, 357 NLRB 1770 (2011), cited by the Union, the Board found that the respondents operated a lawfully "double-breasted" operation until the union entity was shut down. *Id*. at 1786. Significantly, Ryan did not shut Collective down, even in the face of its massive debts, but instead kept Collective open. (JA45, 53, 106). Whether or not Ryan's testimony should be credited as to his hopes of one day resuming Collective's operations (and Petitioners contend that it should)[1], the fact that Ryan chose not to simply walk away from and discard Collective speaks volumes, and lends further support to the legitimate double-breasted operation formed by Collective and Remco.

[1] Indeed, the ALJ stated that it did not credit Ryan Ciullo or Mark Ciullo's testimony only in those instances "*where it differs from* [the ALJ's] *otherwise supported factual findings*." (JA632) (emphasis added). The ALJ did not make any factual findings as to whether Ryan intended to resume Collective's operations or not. Accordingly, there is no basis upon which to discredit Ryan's testimony on this point.

4. There Are Insufficient Alter Ego Indicia Between Remco and RDM

Unlike Remco and Collective, Remco and RDM do not have the same ownership: Remco is owned by Ryan Ciullo and his wife, while RDM is owned by Mark Ciullo and his wife (JA49, 86, 94-95, 632, 633). While the Board asserts in its brief that a familial relationship between owners may amount to common ownership, this is not a *per se* rule. *See Kenmore*, 289 NLRB at 337 ("the existence of a close family relationship between owners of two companies will not always establish the common ownership element in an alter ego inquiry"). Instead, as demonstrated in the cases cited in the opposing briefs, a close familial relationship must typically be accompanied by other alter ego factors. *See id*. (holding that there was "no impediment" to finding that the close familial relationship established the common ownership element where there was record evidence of "less than arm's-length dealing" between the two companies and the owners of the non-union company were financially dependent on the owners of the other, i.e., their parents); *see also Island Architectural*, 892 F.3d at 374 ("Petitioners point out that familial relationships do not alone establish the alter ego relationship, but, as recounted above, the Board had ***substantial additional grounds*** for its alter ego determination.") (emphasis added).

Such "additional grounds" are not present in the relationship between Remco and RDM. RDM is managed by Mark Ciullo and Desiree Ciullo, and Ryan

Ciullo formerly supervised jobs for RDM. On the other hand, the record contains no evidence, nor did the Board or the ALJ find, that Mark Ciullo, Deborah Ciullo or Desiree Ciullo have or have ever had any involvement in Remco, whether as employees, independent contractors, consultants, lenders, or otherwise. Further, there is no record evidence, nor did the Board or the ALJ find, that Remco and RDM share equipment or supplies, or that Remco has purchased or leased any of RDM's equipment or supplies. There is also no record evidence of, nor did the Board or the ALJ find, any transactions between Remco and RDM.

Additionally, Remco and RDM do not share, nor have they ever shared, office space—as mentioned above, Remco initially operated out of 326 Stephan Avenue in Toms River, New Jersey and currently out of 1889 Route 9 in Toms River, New Jersey, while RDM always operated out of 460 Faraday Avenue in Jackson, New Jersey. (JA280, 406, 24-25, 50, 88-94, 174, 176, 182). There is no record evidence, nor did the Board or the ALJ find, that RDM (or Mark Ciullo) provided any assistance, financial or otherwise, to Remco. There is also no record evidence, nor did the Board or the ALJ find, that RDM or Mark Ciullo benefits in any way from Remco. Nor did the ALJ or the Board find that Remco had any of the same customers as RDM after it unionized.

The fact that Remco has hired a handful of former RDM employees does not suggest that the two entities are alter egos. Those employees had, for the most part,

already voluntarily separated from RDM before Remco was even formed. (JA55-56). Moreover, as the ALJ found, in the first quarter of 2016, Remco employed a total of seven people, less than half of whom had formerly worked for RDM. (JA632, 377). In the second quarter of 2016, Remco employed a total of 19 employees, again, less than half of whom had formerly worked for RDM. (JA385). The fact that a few former RDM employees eventually worked for Remco does not suggest an alter ego relationship, especially in light of the absence of any alter ego indicia.

The Board also places great emphasis on the fact that, in seeking an insurance certificate for a Remco job, Ryan told the insurance company that "RDM used to do work for the same company [before it signed with the Union]." (Board Br. 10 (citing GCX 18)). Given the undisputed fact that Ryan used to work for RDM prior to forming Remco, it is not surprising that he would refer to work done by RDM during his tenure. Relatedly, contrary to the Board's assertions, the fact that a general contractor contacted Ryan at Remco for a release on a job that RDM had performed is similarly probative of nothing other than the facts that (1) Remco's owner, Ryan Ciullo, is the son of RDM's owner, Mark Ciullo, and (2) Ryan was previously employed by RDM. Further, the fact that Remco used the same insurance carrier as Collective cannot support a finding that Remco and RDM are alter egos of one another. The most this fact proves is that Ryan was

satisfied with the insurance carrier used by RDM, a company which he worked for, and wanted to ensure the same quality of service for his own company.

It is quite a stretch to argue that these isolated facts justify a finding that the two companies are alter egos of one another, nor are they the types of facts that led to such holdings in the cases cited by the Board and the Union. (*See supra*, at 9-10). As with Remco and Collective's relationship, the relationship between Remco and RDM is worlds apart from the closely intertwined and interdependent relationships which resulted in alter ego liability in the cases cited in the opposing briefs. (*See supra*, at 9-10). Indeed, those cases provide a helpful point of reference for understanding the particular types of business relationships that courts find offensive to the Act. That type of relationship is simply not present between Remco and RDM, and there is not sufficient evidence to the contrary.

5. There Is Not Sufficient Evidence That Remco Was Formed Out of Anti-Union Animus

The evidence relied upon by the ALJ and the Board, and in the opposing briefs, is not sufficient as a matter of law to support the Board's finding that Remco was formed as a result of "anti-union animus." *See Island Architectural*, 892 F.3d at 371 (citing *Fugazy v. Fugazy Continental Corp.*, 265 NLRB No. 165, at 4-5 (1982)). The ALJ and the Board rely on the fact that (1) Remco was formed "shortly after" RDM agreed to a consent arbitration award with the Union; and (2)

Ryan testified that he formed Remco because he was not doing well with union work. (JA634).

First, the timing of Remco's formation does not demonstrate motive to evade union obligations. Instead, the record evidence demonstrates only that Remco was formed after Ryan found himself out of work after the financial demise of Collective and RDM. When RDM signed with the Union, it experienced grave financial difficulty and, as a result, ended up laying Ryan off in late 2014. (JA35). Ryan was therefore out of work, and Collective did not have the capital to continue operating, so he "had no choice, but to go look for a job." (JA35, 52, 189). Ryan then began working performing consulting work for a general contractor (with no familial relationship) in late 2014, and then eventually formed Remco in late 2015. (JA48, 181, 189). Thus, Remco was formed because Ryan was out of work, Collective was in financial shambles, and therefore Ryan needed a source of income. His immediate response was to perform work for an unrelated general contractor. It was not until over a year later that he formed Remco.

The fact that Ryan testified that Remco was formed to take advantage of market for the non-union work does not support the ALJ and the Board's finding that Remco was formed to evade any union obligations. In *Kenmore Contracting*, a case cited in the Board's brief, the Board explained that an "intent to operate a nonunion company and to build a customer base of nonunion companies does not,

without more, manifest and unlawful purpose or indicate antiunion animus." 289 NLRB at 339 (emphasis added). As discussed above, while the "more" is present in the cases cited in the Board's brief, wherein the companies are seriously commingled and intertwined with one another, that "more" is notably absent here with respect to both Remco's relationship with Collective and Remco's relationship with RDM.

Moreover, Ryan's testimony that he wished to take advantage of the non-union marketplace pales in comparison to the egregious and outward manifestations of animus towards the union which has been found to support alter ego liability. For example, in *Island Architectural*, the CEO of the non-union company "repeatedly misled the Union" about the relationship between the two companies, and even made affirmative misrepresentations to the union. In *BMD Sportswear Corp.*, 283 NLRB 142 (1987), the principal of the non-union entity warned and directed employees not to become members of the union, and threatened them with plant closure if they became members or supported the union in any way. *Id.* at 155. Moreover, the non-union company also laid off union supporters. *Id.* at 156. *See also A.D. Conner, Inc.*, 357 NLRB at 1776, 1786 (finding of anti-union animus supported when owner of entity stated to its employees, "'there will be no [expletive] union at A.D. Conner [the non-union

entity]'", threatened employees, solicited employees to decertify their unions, and discharged employees due to their union affiliation and union activities).

Here, on the other hand, the record contains no similar evidence with respect to Ryan. In fact, Ryan was candid and forthcoming with the Union regarding his history with Collective and RDM. (JA138). Ryan did not discourage any RDM employees to leave once the company became unionized. Instead, Ryan only hired those employees who voluntarily departed from RDM because they did not want to participate in the union. (JA55-56, 118). Indeed, the Board acknowledges that Ryan "specifically targeted former RDM employees who did not want to join the Union when he hired for Remco." (Board Br. 28).

Thus, not only is there not sufficient evidence to show that Remco is a single integrated enterprise with either Collective or RDM, but there is also not sufficient evidence to support the Board's determination that Remco was formed to avoid Collective or RDM's union obligations.

B. Neither the Board Nor the Union Has Provided any Compelling Reason why This Court Should Not Adopt the Equitable Approach to the Alter Ego Doctrine That Has Been Applied by District Courts in This Circuit

Both the Board and the Union go to great lengths in their briefs to pick apart the decision in *Flynn v. Interior Finishes, Inc.*, 425 F. Supp. 2d 38 (D.C.C. 2006) and draw even the most immaterial distinctions in an effort to convince this Court

not to adopt its reasoning.[2] However, the district court in *Interior Finishes* did not limit its holding to the unique facts of that case. Instead, the *Interior Finishes* decision embodies a broader policy pronouncement that is generally applicable in the context of collective bargaining agreements, and should be adopted by this Court.

First, the Board asserts that *Interior Finishes* should not be adopted by this Court because in that case, the union entity was formed to do business for a particular client, which is not the case here. (*See* Board Br. 31). However, this fact had no bearing on the court's analysis or decision whatsoever. *See Interior Finishes*, 425 F. Supp. 2d at 51-56. Thus, this distinction does not provide a compelling basis upon which to reject the reasoning of *Interior Finishes*.

Second, the Board asserts that *Interior Finishes* is distinguishable from this case because Collective did not continue to operate after Remco's formation. (*See*

[2] To the extent the Union asserts that the Court cannot consider this argument because it was not raised before the ALJ, such an assertion must be rejected. The cases cited by the Union in support of this argument all stand for the proposition that a party cannot assert *facts* post-hearing that were not at issue before the ALJ. *See Trident Seafoods, Inc. v. N.L.R.B.*, 101 F.3d 111 (D.C. Cir. 1996); *Anthony Motor Co., Inc.*, 314 NLRB 443 (1994); *Camay Drilling Co.*, 254 NLRB 239 (N.L.R.B. 1981), *enforcement granted sub nom. Operating Engineers Pension Tr. v. N.L.R.B.*, 676 F.2d 712 (9th Cir. 1982); *Union Elec. Co.*, 196 NLRB 830 (1972). The question of whether this Court should adopt the reasoning of *Interior Finishes* is a legal issue. Thus, the concerns underlying raising a factual issue post-hearing (i.e., a fair opportunity to develop the record) are not present. In any event, the factual record as to harm to and deception of the union was fully developed before the ALJ.

Board Br. 32). However, the Board's reading of *Interior Finishes* is simply incorrect. In *Interior Finishes*, while the non-union company remained open, it did not perform any work. Similarly, here, Ryan Ciullo never shut Collective down.

In any event, the court in *Interior Finishes* went on to state, "[e]ven had Interior Finishes actually 'shut down,' as suggested by the Trustees, the court would still conclude application of the alter ego doctrine is inappropriate given that 'the union membership with rights under a collective bargaining agreement' was not 'worse off' than it was before the asserted closing." *Interior Finishes*, 425 F. Supp. 2d at 54 (citing *A.A. Bldg. Erectors, Inc*., 343 F.3d 18, 22 (1st Cir. 2003)). As explained in Petitioners' opening brief, as a result of debts, liens, and other financial difficulties experienced by both Collective and RDM, neither company had sufficient capital to perform projects because they could not even afford to pay its workers. (JA85) (Mark Ciullo explaining that Collective could no longer pay its staff due to its enormous debt); (JA102-104) (Mark Ciullo explaining that once it went union, RDM could no longer get work from its regular customers because of the cost burdens of hiring union); (JA132) (Mark Ciullo stating that while he has been trying to get jobs for RDM, it is hard to get bids and perform work "without any money").[3] Thus, the Board's assertion that "[t]here is no record evidence that

[3] Again, as discussed in Footnote 2, *supra*, there is no basis upon which to discredit this testimony, because the ALJ did not make any contrary factual findings. (JA634).

the work Collective and RDM had done was still performed by employees represented by the Union after Remco's formation," (Board Br. 32), is irrelevant, because it was RDM and Collective's financial difficulties, not the formation of Remco, that led to its employees ceasing to perform union work. (Board Br. 32). In other words, the Union was "no worse off" as a result of Remco's formation, because Collective and RDM were financially unable to continue operating, whether Remco formed or not.

The Board makes much of the fact that Ryan Ciullo did not "attempt to continue" Collective's operations. However, nowhere in the *Interior Finishes* decision does the court express or even suggest that its reasoning only applies where a company must make efforts to keep performing work.

Additionally, the Board asserts that *Interior Finishes* should not apply because Ryan Ciullo informed the Union about his relationship with Collective and RDM *after*, and not *before*, forming Remco. This is a distinction without a difference. The operative question, as recited in the Circuit Court cases upon which *Interior Finishes* is based, is whether there is "any evidence" that the union was "deceived" about the "structure, ownership, or relationship" between the two entities. *Interior Finishes*, 425 F. Supp. 2d at 52 (citing *A.A. Bldg Erectors, Inc*., 343 F.3d at 22). The only reason the court in *Interior Finishes* spoke of disclosing the relationship to the union prior to entering into a collective bargaining

agreement is because *Interior Finishes* involved the reverse situation (i.e., a non-union entity forming before a union entity). Here, Collective and RDM existed prior to Remco's formation, so there would be no way for Ryan to have informed the union of Remco prior to Collective and RDM entering collective bargaining agreements.

As discussed in Petitioners' opening brief, there are no record facts, nor did the ALJ or the Board find, that Ryan concealed from the Union the formation or existence of Remco or his relationship with Collective and RDM. The fact Ryan "admitted" these facts to the Union, instead of affirmatively approaching the Union with these facts first, makes no difference. The bottom line is that Ryan made no effort to deceive the Union, and was honest with the Union at all times.

Finally, the Board and the Union's argument that the reasoning in *Interior Finishes* should not apply because it was adopted in the ERISA context is unavailing. It is well-established that the alter ego doctrine is applied interchangeably in both the labor and ERISA contexts. *See Island Architectural*, 892 F.3d at 371 (setting forth law of the D.C. Circuit with respect to alter ego liability and citing to cases involving both ERISA and labor violations) (citing *Flynn v. R.C. Tile*, 353 F.3d 953 (D.C. Cir. 2004) (ERISA case); *Fugazy*, 725 F.2d 1416 (D.C. Cir. 1984) (labor case)); *see also Boland v. Thermal Specialties, Inc.*, 950 F. Supp. 2d 146, 152 (D.D.C. 2013). Even accepting the Board's argument

that the "equitable defense" should only apply where a fund did not actually lose any contributions, (*see* Board Br. 34), those circumstances exist here, where the Union would have suffered as a result of Collective and RDM's financial difficulties, whether Remco was ever formed or not.

In sum, whatever distinctions may exist between this case and *Interior Finishes*, they do not take away from the fact the broader rationale of *Interior Finishes*, which is that when the union is neither harmed nor deceived by the relationship between a union and non-union entity, the alter ego doctrine should not be mechanistically applied to hold both entities liable for the union entity's union obligations. *Interior Finishes*, and the Circuit Court cases upon which it is based, offer a principled and logical approach to alter ego liability; one which reflects industry realities, while protecting union interests.

III. CONCLUSION

For each of the reasons set forth above, Collective and Remco's Petition should be granted, and the Board's Order requiring Remco to recognize and bargain with the Union and to apply the terms and conditions of the CBAs governing Collective and RDM should be denied enforcement. Collective and Remco further request that they be awarded their costs and any other relief, legal or equitable, to which they are entitled.

Dated: November 2, 2018

Respectfully submitted,

/s/ Paul Kennedy

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,756 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 210 in Times New Roman Font 14.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2018, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

Respectfully submitted,

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